

1 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

2 -----x  
3 UNITED STATES OF AMERICA,  
4 Plaintiff,

CR 05-104

5 versus United States Courthouse  
6 225 Cadman Plaza East  
Brooklyn, N.Y. 11201  
7 SHAHAWAR SIRAJ MATIN,  
8 DEFENDANT.

9 -----x  
January 8, 2007  
10 4:10 p.m.

TRANSCRIPT OF SENTENCE

11 Before: HON. NINA GERSHON,

DISTRICT COURT JUDGE

12 APPEARANCES

13 ROSLYNN R. MAUSKOPF  
14 United States Attorney - Eastern District of New York  
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15 Brooklyn, New York 11201  
TODD HARRISON, ESQ.  
16 MARSHALL MILLER, ESQ.  
Assistant United States Attorneys

17  
18 ATTORNEY FOR DEFENDANT:

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20 SEAN MICHAEL MAHER, ESQ.

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25 Proceedings recorded by mechanical stenography, transcription  
by CAT.

ALLAN R. SHERMAN, CSR, RPR Official Court Reporter  
United States District Court Eastern District of New York

1 THE CLERK: Criminal cause for sentencing, United  
2 States of America versus Shahawar Siraj Matin, docket number  
3 CR 05-104.

4 MR. MILLER: Marshall Miller and Todd Harrison for  
5 the government.

6 MR. STOLAR: For the defendant, Martin R. Stolar,  
7 Khurrum Wahid and Sean Michael Maher.

8 MR. GJELAJ: Mark Gjelaaj for the probation  
9 department.

10 THE COURT: Counsel, the first thing I want to do is  
11 ask Mr. Matin whether he read the presentence report and the  
12 addendum to the presentence report?

13 THE DEFENDANT: Yes, your Honor, I did.

14 MR. STOLAR: I don't believe he read the addendum  
15 because I didn't have it. Somehow it didn't get E-mailed to  
16 me. I picked it up today.

17 THE COURT: Let's take a moment and let me go over  
18 it with him.

19 MR. STOLAR: I don't think that it's very  
20 significant.

21 THE COURT: He has the right to read it and discuss  
22 it with his attorney and I think it's important that we take  
23 care of that.

24 (Pause.)

25 THE COURT: Mr. Matin, have you now had an

1 opportunity to read the addendum and to discuss it with your  
2 attorney's?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: And you discussed the presentence report  
5 itself with your attorneys?

6 THE DEFENDANT: Yes.

7 THE COURT: In addition to those documents, I have  
8 also reviewed the following documents; a letter from Mr.  
9 Stolar dated December 21, 2006 which contained various  
10 attachments, including letters in support of the defendant  
11 from his family and associates and a psychologist's report.  
12 Also I reviewed the letter from Mr. Stolar dated  
13 November 23rd, 2006 to the probation department.

14 In addition, I had letters from the government dated  
15 November 9, 2006 and December 4 and 29th, 2006.

16 Is there anything else that should have been in my  
17 file?

18 MR. HARRISON: No, your Honor.

19 MR. STOLAR: That is the same file that I have in  
20 front of me, judge.

21 THE COURT: Very good.

22 Well then with respect to the presentence report,  
23 counsel have addressed at some length the issues of  
24 obstruction of justice and acceptance of responsibility which  
25 of course affect the guidelines and I will rule on those

1 issues.

2 For now, I want to just ask whether there are other  
3 issues regarding the presentence report that counsel wish me  
4 to address.

5 In my view, there aren't any other issues that would  
6 affect the sentencing.

7 MR. STOLAR: With respect to the guidelines  
8 calculations, those are the only two open issues. Otherwise  
9 the calculations are as called for by the guidelines.

10 THE COURT: Is there anything else that is in the  
11 PSR that you feel you need a ruling on?

12 MR. STOLAR: No, judge.

13 THE COURT: Then with respect to the request for the  
14 obstruction of justice enhancement based upon perjury, I'd  
15 like to hear counsel's views on the standard of proof that the  
16 government must meet to prove perjury for sentencing purposes.

17 In the past when dealing with this issue in other  
18 cases, I've applied a clear and convincing evidence standard  
19 based on cases such as United States versus Kelly, 147 F.3d  
20 172 at 178 which is a Second Circuit case of 1998.

21 However, in preparing for today's sentencing I  
22 noticed that there are recent Second Circuit cases which  
23 without saying that the earlier cases are incorrect, describe  
24 the standard as preponderance of the evidence. For example,  
25 one case is United States versus Agudelo, 414 F.3d 345. And

1 I'm just asking if counsel wish to address this or have any  
2 enlightenment on that subject.

3 MR. STOLAR: I would have thought that the standard  
4 should be clear and convincing evidence. If you are going to  
5 find that someone who took the witness stand and testified in  
6 his own defense differs in his recollections about things that  
7 happened from somebody who testifies for the government, that  
8 can be a difference in recollection. It does not necessarily  
9 have to be perjury. So it has to be I would think by a clear  
10 and convincing standard, not merely a preponderance.

11 MR. HARRISON: Judge, there are recent cases in the  
12 Second Circuit as the Court points out that set a  
13 preponderance standard. Frankly, in this case it's the  
14 government's position that under either standard we have  
15 proven in fact that that does apply.

16 This isn't a case of just simply a difference in  
17 recollection. As we've laid out in the papers and as the PSR  
18 talks about, the defendant's testimony both at the suppression  
19 hearing and during the trial, throughout the trial was just  
20 clearly, flatly contradictory to a number of other witnesses'  
21 testimony, specifically the undercover officer as well as the  
22 CI.

23 And we have talked about that in our papers. So  
24 frankly, I think under either standard the government has met  
25 it.

1 MR. STOLAR: Judge, the problem is that it has to be  
2 dealing with something that is extremely material to the case.  
3 And what was material here was Mr. Martin's admission that;  
4 yes, he was part of the conspiracy to blow up the 34th Street  
5 subway station. That is the material aspect of it. Other  
6 things not necessarily material but the central argument, the  
7 central basis of the defense that he essentially was talked  
8 into doing this, has not been contradicted by anybody except  
9 the confidential informant obviously.

10 Obviously there is a difference in perspective and  
11 he sees it from his own subjective perspective and he  
12 shouldn't be punished for taking the witness and testifying  
13 about his subjective perspective.

14 MR. MILLER: First, with respect to materiality,  
15 there could be nothing more material to this case at both the  
16 hearing and the trial than the false statements that the  
17 defendant made. At the hearing, the goal of the hearing from  
18 the defendant's perspective was to suppress statements. His  
19 changing story, from time to time changing was intended to  
20 induce your Honor to suppress those statements.

21 Just to take one example, his argument, his  
22 testimony that he believed that Mr. Harrison was his attorney  
23 didn't come out of a vacuum and it wasn't immaterial. It was  
24 directly material. He felt that were he to prevail on your  
25 Honor to find that was the indeed the case, the statements

1 would be suppressed.

2 Similarly at the trial his false statements with  
3 respect to his own opinions, his own affinity for, his own  
4 support for terrorist activity or the lack thereof as he  
5 testified initially were false and intended to induce the jury  
6 to find that he was in fact a person who was innocent, he was  
7 a person who didn't have the violent tendencies that indeed he  
8 really did have, he was a person who wasn't interested in and  
9 supportive of terrorist activity before he met the CI.

10 He did so in order to induce the jury to come back  
11 with a not guilty verdict based on his defense. So there is  
12 nothing that could possibly be material than the false  
13 statements that the defendant made both at the hearing and at  
14 the trial.

15 With respect to the argument that counsel pulls out  
16 of the air that there is nothing to contradict the defendant's  
17 statements with respect to what happened, everything at the  
18 trial contradicted what the defendant said about what happened  
19 between him and the CI, not just the CI but the testimony of  
20 the undercover completely subverted his initial testimony as  
21 to what his character was like prior to meeting the  
22 confidential informant, which as your Honor noted in the  
23 recent opinion, was the basis of his defense.

24 Mr. Elshafay completely contradicted the defendant's  
25 testimony, the tapes and the absence of any statements that

1 would possibly support what the defendant alleged, the fact  
2 that dozen of hours of conversations where these individuals  
3 spoke together, the two of them and the three of them, at  
4 length about the plot, about where it came from, and the fact  
5 there was not a single instance where there was any reference  
6 to what the defendant testified at trial is also contradictory  
7 of the defendant's statements.

8           So the idea that no one by the CI contradicted the  
9 defendant is just not true, is not factual.

10           So with respect to both of those issues, the  
11 government believes, as Mr. Harrison already pointed out, that  
12 under either standard, the standard has been met at both the  
13 hearing and the trial.

14           THE COURT: Anything else on the standard?

15           MR. STOLAR: No, judge.

16           THE COURT: I do think that the appropriate standard  
17 for this enhancement where it's based on the perjury of the  
18 defendant is the clear and convincing standard and that is the  
19 standard I will apply and I'll make my rulings with regard to  
20 that later.

21           So at this point I'll hear from the defense counsel  
22 with respect to sentencing and from the defendant and then the  
23 government.

24           MR. STOLAR: Judge, it seems to me that the question  
25 before you is whether you are going to sentence an individual



1 or you are going to sentence an image, whether you are going  
2 to sentence a real person or some kind of mirage that has been  
3 created, whether you are going to sentence a human being or a  
4 symbol. And the submission we made to you is that it is a  
5 real human being that you are sentencing. It is not somebody  
6 who is a symbol of terrorism, it's not somebody who as the  
7 NYPD would like to think, they have created a crime so they  
8 can could solve one so they could establish their duty in the  
9 war on terrorism. That is not who Martin is. That is not the  
10 individual he is. He is somebody who by the objective testing  
11 of the forensic psychologist and by the grades that you can  
12 see in the attachment that he achieved in school, he is at the  
13 lower end of intelligence. This is not something that he  
14 would have come up with by himself. There was a two-year  
15 period when he had contact with both the confidential  
16 informant and the undercover officer where nothing happened,  
17 regardless of whether he made statements or not, whether were  
18 political statements or opinion statements. Nothing happened  
19 during that two year period.

20 It wasn't until April from our point of view of 2004  
21 that finally something happened and started going. We still  
22 insist that he never would have done anything by himself had  
23 it not been for the man who was twice his age who was  
24 preaching to him about Islam and the duty of somebody who is  
25 becoming more traditional Islamic, it never would have

1 happened, nothing would have happened.

2           So this is somebody who is at the lower end of the  
3 scale of intelligence. He is an immature young man. He is  
4 now 24 years old. He was 22 when this all started. And if he  
5 is out with his buddies like Kamil Pasha of the same age,  
6 basically doing trash talking, and that's what all the kids  
7 hanging around do, they trash talk. So that's where we are  
8 at. He is not somebody who is a terrorist. That is just not  
9 the person you are sentencing.

10           And in fact, as you know from the videotape, he was  
11 going to try to get out of this. He was withdrawing at the  
12 end. That is what he said. That was on the videotape. I'm  
13 going to have to ask my mother for permission or my father for  
14 permission. That hardly sounds to me like a terrorist.

15           So the picture that is painted of the person who you  
16 are sentencing is painted I think in the submission that we've  
17 made, in the letters of people who know him, who know him to  
18 be an immature and easily manipulated young man, in the  
19 forensic psychologist's report which the government basically  
20 says is wrong. Nobody can buy Allan Goldstein. He is as  
21 objective as they come, particularly in a case like this. And  
22 what his findings are based on the testing that he did  
23 consistent with the low school grades. And the person that  
24 you saw testify who was not, as I've said on prior occasions,  
25 not the brightest light bulb in the chandelier, that's who you

1 have before you. You don't have somebody who is a committed  
2 terrorist. And the sentence ought to take into account who  
3 the individual is and that is the submission that we have  
4 made. And I think under 3553(a), regardless what the  
5 guidelines say, you sentence a young man, you don't sentence  
6 somebody who is a symbol of the war on terror because that's  
7 not who he is.

8 That is my argument, judge.

9 THE COURT: Thank you.

10 Mr. Matin, is there anything you would like to say  
11 to me directly with regard to sentencing?

12 THE DEFENDANT: I want to apologize first to you for  
13 all the recording that we listen in my trial. Your Honor, I  
14 want to apologize about whatever I said in the tapes. I wish  
15 I can take those words back but it cannot happen. I already  
16 said those things and at the time when this happened, it is  
17 true that this person, if the CI never comes in my life, I  
18 never ever do this thing. In the end, I told him many things.  
19 I told him I don't want to do it but he keep on telling me;  
20 you don't want to do it, what about last time? What are you  
21 going to do in the future? I don't remember exactly  
22 everything but certain things are recorded in the tape with  
23 this last conversation with the individual. I told him clean  
24 that, Mr. Eldawoody that I don't want to do it because of the  
25 people who were going to die over there. And that is on the

1 tape. I told him I will ask my mother's permission. That is  
2 on the tape. He says over there clean about the -- about  
3 certain things that oh, what about you want me to call  
4 Mr. Abdul Hakim and tell him that you don't want to do it. I  
5 told him go tell him, I don't care. Because there are a lot  
6 of general conversation that is not recorded previously in  
7 April and March, long before which is more or less general  
8 talking, but there were certain times that Mr. Eldawoody did  
9 say to me certain things about if you are not going to go with  
10 these people, this will happen to you; if you do not go with  
11 these brothers if you are join them and you are not going to  
12 do with those brothers and you deny it at the end, that will  
13 be the problem.

14 So I apologize for all the stuff that I said on  
15 those tapes, your Honor. The conspiracy did happen. 34th  
16 Street was spoken by me and I already tell them that I'm  
17 taking the responsibility of 34th Street, that that conspiracy  
18 did happen and I'm taking that responsibility of 34th Street  
19 subway station. But I was manipulated by this person. If  
20 this person never came in my life, I never do this. And I  
21 apologize to Mr. Harrison and Mr. Miller and the jury if they  
22 were present.

23 That is it, your Honor.

24 THE COURT: Mr. Harrison.

25 MR. HARRISON: Just briefly, I'll make a couple of

1 points then Mr. Miller will take over.

2 No one is asking the Court to sentence the defendant  
3 as some sort of symbol. We're asking the Court to sentence  
4 the defendant as someone who has in fact committed a crime,  
5 and frankly, as we heard, someone who has not taken  
6 responsibility for that crime and it was a very serious crime.

7 This defendant is not at the low end of  
8 intelligence. The defendant testified before you twice. He  
9 was very calculating in his testimony frankly. He saw where  
10 Mr. Miller and I were trying to go in cross-examination and he  
11 tried to get there before us. He played off of his defense  
12 attorney's objections at trial. He could read where the  
13 defense attorney wanted him to go.

14 This individual, the defendant, is certainly not at  
15 the low end of the intelligence scale. As you saw from his  
16 testimony, he is very calculating. During the course of the  
17 crime the defense wants to sort of relitigate the case now  
18 when the case has been proved not only beyond a reasonable  
19 doubt but beyond any doubt.

20 During the course of the crime the defendant came up  
21 with a plan to attack Staten Island. He came up with a plan  
22 to attack the Verrazano Bridge. He was later involved in  
23 bringing James Elshafay who he knew wanted to carry out a  
24 terrorist attack together with the confidential informant who  
25 he believed to be part of a brotherhood who could provide

1 explosives. He did that. The defendant on his own carried  
2 out reconnaissance of 34th Street Herald Square subway  
3 station. Nobody told him to do that. The defendant on his  
4 own came up with a plan to bomb the 34th Street Herald Square  
5 subway station. Nobody told him to do that.

6           The defendant on his own drew a diagram of the 34th  
7 Street Herald Square station and where to place a bomb in that  
8 station and in direct contradiction to the defendant's  
9 protestations of innocence and not wanting to hurt anyone, the  
10 jury and the Court heard plain as day on those tapes that the  
11 defendant, although he did say that he wanted to try not to  
12 kill people, he was perfectly willing to have people die,  
13 homeless people, other people who might be on the train when  
14 the bomb went off, and that was clear as day on the tape.  
15 This was not an individual who had no idea what was going on.  
16 This is an individual who was calculating and knew exactly  
17 what was going on and was the initiator of almost all of the  
18 steps, I guess you could say all of the steps frankly, of the  
19 actual crime, a very serious crime, planning to place a bomb  
20 in one of the most crowded subway stations in New York City.  
21 To try and brush that off and pretend that it was trash talk  
22 as counsel says is frankly ludicrous. And I understand he has  
23 a job to do but how could anyone have listened to all of those  
24 tapes talking about wanting -- serious plans for wanting to  
25 place a bomb on a crowded subway, talking about how they were

1 delighted in 911, talking about how they hope that Osama Bin  
2 Ladin struck again, all the statements that the defendant made  
3 even prior to that, even prior to his ever meeting the  
4 confidential informant to the undercover officer. And I'm not  
5 going to go through all of them. We have gone over them again  
6 and again and we have heard the defendant's own voice  
7 repeatedly talking on the tape about how he wanted to place a  
8 bomb and do violence to the economy of New York City for his  
9 political objectives. This defendant does not lack  
10 intelligence. He was calculating, knew what he was doing. He  
11 was the initiator of this plot.

12 MR. MILLER: Your Honor, to follow up on what Mr.  
13 Harrison said.

14 With respect to the seriousness of the crime, it's  
15 hard to imagine a more serious or dangerous conspiracy crime  
16 than the one the defendant is charged with and the defendant  
17 has been convicted of.

18 And what is interesting here is that there is an  
19 effort on the part of the defense to spin this as somehow the  
20 testimony of the CI was the critical moment in this trial and  
21 that was the critical evidence. But the evidence of the  
22 crime, the evidence of the crime itself comes from the  
23 defendant's mouth. The government isn't trying to spin some  
24 image of someone who was plotting to commit a terrorist  
25 attack. The defendant plotted to commit a terrorist attack

1 right in this courtroom and we heard him do it and that it was  
2 he who was the driving force, the moving force behind this  
3 plan. He came up with the plan. He plotted to bomb various  
4 locations within New York City. He honed the plan down to the  
5 34th Street subway. He chose it. He was the moving force all  
6 the way up to the arrests on the eve of the execution of the  
7 plot.

8 Now, focusing then also on his role in the offense,  
9 which is also a critical issue for your Honor to think about  
10 in sentencing, this attack was really his brain child. As I  
11 just said, he chose the station, he chose the place within the  
12 station where the bomb should go. He went and looked at every  
13 angle again and again to get just the right location. He was  
14 the one who decided how the bombers should dress. He was the  
15 one who provided the information about where the bombers  
16 should enter the subway station, how they should walk through  
17 it, where they should plant the bomb and exit it. He was the  
18 one who timed how quickly the subways came so they could come  
19 up with a getaway plan, how long was it going to take for the  
20 next subway to come to they can leave the bomb, get away  
21 before the detonation happens.

22 It shows the important driving role that he plays  
23 within the organization, but these are not the kinds of  
24 questions and the kinds of issues and the kinds of complicated  
25 analyses that are done by someone of the level of intelligence



1 that is in the report and that is being proffered by the  
2 defense.

3           They can say all they want that he has lower  
4 intelligence but everything we have seen at the trial from his  
5 complex strategies and plans for bombing things to his  
6 testimony at trial belie that argument that he is somehow not  
7 intelligent. It's just not the case. And as Mr. Harrison  
8 mentioned, this attack, this plot was really his handy work.  
9 If you think about it, he really did every single thing that  
10 happened with respect to this plot. James Elshafay came up  
11 with some initial idea which he then honed down to something  
12 that he brought to the CI. Every other step thereafter was  
13 the defendant's step. He was the visitor to the location. He  
14 came up with the ideas. All he did was come to the CI and say  
15 can you give me the explosives to make this thing happen. And  
16 the CI at the direction of law enforcement continued that  
17 role. Of course, he adopted that role. That's what you would  
18 want law enforcement to do.

19           Here is a guy with a complex plan and another guy  
20 who is willing to bomb something approaching a government  
21 informant and saying can you get explosives to make this thing  
22 happen. Of course, the CI says yeah, I can get you explosives  
23 to make sure that he doesn't go somewhere else and find  
24 somebody who would give him explosives and could give him  
25 explosives. That's what the CI did. What the defendant did

1 was every other thing that relates to this plot.

2 In fact, as he was explaining this complex plot to  
3 the CI and to Elshafay, he was frustrated by the fact that  
4 they didn't get it, they weren't up to speed with him, they  
5 couldn't keep up with him. He was the one that knew the  
6 subway station. He even drew a map for the CI so he would  
7 understand it. He admitted on cross-examination that he  
8 really didn't get it so he took them on a field trip to show  
9 them the location so that they could scout it out so that they  
10 could get it done. He led them there, showed them around and  
11 then they did a second map.

12 The role of law enforcement seems to be an issue  
13 that the defense tried to bring up here. The fact that law  
14 enforcement intercepted this plot at an early stage, the fact  
15 that the defendant brought his idea to someone who happened to  
16 be an informant for the NYPD doesn't make the conspiracy crime  
17 any less serious or the defendant any less culpable. It just  
18 means that law enforcement did its job.

19 And it's a red herring to try to turn this case into  
20 some sort of referendum. I would suggest that the defense is  
21 trying to make this case into a symbol about law enforcement.

22 From the government's perspective, this is a  
23 sterling example about how law enforcement should work and  
24 bring cases through the criminal justice system; develop  
25 evidence, present it to the jury, then present the case to

1 your Honor, achieve a conviction and then let your Honor  
2 deliver the sentence that is just.

3 But putting that aside, it doesn't really matter  
4 whether it's a model example of law enforcement or not a model  
5 example of law enforcement. What matters is that this  
6 defendant was caught on tape committing a incredibly serious  
7 crime and being the driving force behind that crime.

8 Finally, with respect to protecting the public,  
9 another critical issue for your Honor to decide, it's not very  
10 often that you come to court to engage in a sentencing where  
11 the defendant has expressed in his own words in a natural  
12 course of conversation but happened to be caught on a tape  
13 that he intends to remain committed to violent Jihad until the  
14 day he dies a martyr's death during a terrorist attack.  
15 That's what we have here. This is the situation.

16 Now, the defense can call it trash talk all they  
17 want but we have the defendant speaking to his friend making  
18 that statement. And for that reason, your Honor, I think that  
19 a sentence within the sentencing guidelines is an appropriate  
20 steps on that element, that is with respect to protecting the  
21 public.

22 Finally, your Honor, the sentencing guidelines, when  
23 appropriately applied as they will be in this case and in this  
24 case based on all the facts in this case in the government's  
25 view recommend a sentence for the crimes that the defendant

1 has been convicted of, that is 30 years to life and we ask  
2 that the Court sentence the defendant within that range.

3 THE COURT: Anything else?

4 MR. HARRISON: No, your Honor.

5 MR. STOLAR: It's just a very different view of the  
6 trial evidence, a very different view of the individual who is  
7 in front of the Court. He is not a symbol of terrorism and he  
8 should not be sentenced as such.

9 THE COURT: If there is nothing further, I will  
10 proceed to make my findings relative to the sentencing and  
11 then impose sentence.

12 First, with respect to the obstruction of justice,  
13 the government requests a two level adjustment for obstruction  
14 of justice under Guideline Section 3C1.1 based upon  
15 defendant's false testimony at both the suppression hearing  
16 and at trial.

17 I find by clear and convincing evidence that the  
18 enhancement applies.

19 First, with respect to the suppression hearing, the  
20 issue at the suppression hearing was whether the defendant's  
21 confession to law enforcement should be suppressed.

22 Following an evidentiary hearing, this Court denied  
23 the motion in an opinion that is reported at 424 F. Supp 2nd  
24 509. As is clear from that opinion, there were numerous  
25 instances in which the Court did not credit the defendant's

1 testimony. The issue here, however, is whether the Court  
2 finds that the defendant willfully obstructed justice. It's  
3 not enough to find that I didn't credit his testimony.

4 I do, however, in fact further find that the  
5 defendant willfully attempted to obstruct justice.

6 Two examples will suffice. One involved efforts on  
7 the part of the defendant to show a basis for suppression of  
8 his confession. They therefore are material. Application  
9 note six to the guideline defines material information as  
10 information which, "If believed would tend to influence or  
11 affect the issue under determination."

12 The first such willful false statement was the  
13 defendant's testimony that he believed that one of the  
14 assistant United States Attorneys who was present at the  
15 interview during which he confessed was his own attorney.

16 Obviously, the point of this testimony was to  
17 suggest that he described his role in the crimes because he  
18 thought he was in the presence of his own attorney.

19 At page 512 in footnote three of the reported  
20 decision on the suppression motion, I identified in detail all  
21 the reasons I found that the defendant's testimony was  
22 untruthful and I incorporate those findings here.

23 I now further find, as required for the enhancement  
24 by clear and convincing evidence, that the testimony of the  
25 defendant was willful and intentionally false and was not the

1 result of an honest mistake or confusion or a faulty memory.

2 The second perjurious statement which I rely on here  
3 was that the defendant was handcuffed throughout the  
4 interview.

5 That testimony occurred at pages 125 to 126 of the  
6 January 24, 2006 transcript. Again, I not only find that this  
7 testimony was false but also that it was willfully and  
8 intentionally so and not the result of an innocent mistake.  
9 That the testimony was false is based upon my observations of  
10 the defendant whose testimony generally lacked candor, was  
11 evasive, contradictory and opportunistic, that is, he was  
12 frequently willing to say whatever would appear to help him at  
13 the moment.

14 At the suppression hearing I credited the testimony  
15 of other witnesses who testified that according to standard  
16 procedure, the defendant was uncuffed during the interview.  
17 The defendant's false testimony in this regard was clearly  
18 material. Had I credited it, it would have lent support to  
19 the defendant's claim that his confession was involuntary and  
20 coerced.

21 The government also argues that numerous of  
22 defendant's statements at the trial were willfully and  
23 materially false. Of course, merely because the jury rejected  
24 the entrapment defense does not mean that a defendant's  
25 testimony in support of such a defense constitutes perjury.

1           Here, however, the testimony of the defendant in  
2 support of that defense included specific and I find  
3 deliberate lies. It was a central tenet of the defense and a  
4 central part of the defendant's direct testimony that he was a  
5 non-violent person who did not support violent conduct or  
6 terrorist activity.

7           Among other things, he testified that he had never  
8 expressed support for terrorism or terrorist activities or for  
9 Osama Bin Ladin before he met the confidential informant.

10           See for example the trial transcript at pages 2774  
11 to 2780.

12           The government relies on the rebuttal testimony of  
13 the undercover officer to prove the falsity of these  
14 statements. The credibility of the undercover was  
15 established. I have no reason based upon his testimony, his  
16 demeanor or the evidence as a whole to discredit the  
17 undercover's testimony as to what the defendant said to him.  
18 In contrast, the defendant once again was evasive,  
19 contradictory and generally lacking in credibility.

20           And I note the case United States versus Onumonu 999  
21 F.2d 43, which is a Second Circuit case from 1993 which held  
22 that the somewhat nicknamed two witness rule which was  
23 applicable in a criminal perjury conviction is inapplicable to  
24 a perjury enhancement under guideline 3C1.1.

25           According to the credible testimony of the

1 undercover officer, prior to meeting the confidential  
2 informant the defendant had regularly expressed support for  
3 violent terrorist acts and his support for Osama Bin Laden and  
4 Al Qaeda and their terrorist actions.

5 See, for example, the trial transcript at pages  
6 3312, 3327 to 3328.

7 Because the defendant's false statements were  
8 directed at convincing the jury that he had been induced to  
9 commit the crimes by the confidential informant, they were  
10 material. The defendant's alleged non-violent nature was  
11 material because the defendant's defense hinged on his claim  
12 that only after he met with the confidential informant and  
13 only because the confidential informant inflamed his anger  
14 against America did he harbor violent thoughts against America  
15 and seek to harm its economy.

16 Proof that the defendant had harbored and only  
17 expressed such thoughts before the time he was allegedly  
18 induced by the confidential informant directly rebutted this  
19 claim. The issue was therefore very material to the outcome  
20 of the trial.

21 In sum, by clear and convincing evidence I find that  
22 the defendant lied at the trial with the wilful intent to  
23 persuade the jury rather than as a result of confusion,  
24 mistake or faulty memory or some other innocent reason.

25 This effort to persuade the jury as to a key part of



1 his defense amounted to a willful attempt to obstruct justice.  
2 The sentence guideline issue is that the defense argues that  
3 even though the defendant put the government to its proof at  
4 trial, he is nonetheless entitled to a two level downward  
5 adjustment for acceptance of responsibility because: "He  
6 admitted that the 34th Street plan was his and he was an  
7 active coconspirator."

8 To begin with, an acceptance of responsibility  
9 adjustment is ordinarily not available to a defendant who puts  
10 the government to its proof at trial. It is also ordinarily  
11 and understandably unavailable where a defendant is found to  
12 have obstructed justice. And that he is set forth in the  
13 guidelines 3E1.1 and the accompanying notes to that guideline.

14 The government's proof of the defendant's knowing  
15 participation in the four conspiracies charged was  
16 overwhelming and the only theory of defense was entrapment.  
17 The defendant did not clearly demonstrate his acceptance of  
18 responsibility.

19 On the contrary, his efforts to deny responsibility,  
20 despite acknowledging that the 34th Street bombing plan was  
21 his plan were both vigorous and false. Thus, it's unnecessary  
22 for me to decide the issue which is apparently unresolved in  
23 this Circuit whether a defendant offering an entrapment  
24 defense could ever be given an acceptance of responsibility  
25 adjustment. See United States versus Rosa, 17 F.3d 1531,

1 Second Circuit 1994, Cert denied 513 U.S. 879.

2 I'm going to turn then to the guidelines  
3 calculation. It's undisputed that the base offense level is  
4 24 and that 12 additional levels are added as described in the  
5 presentence report. In addition, I will add two levels for  
6 obstruction of justice based upon the defendant's perjuries  
7 that I have just discussed. I note that any one of the  
8 perjuries would warrant an enhancement. Thus, the guidelines  
9 three is 38.

10 It is also not disputed that the criminal history  
11 category is six because of the nature of the crime. And that  
12 is pursuant to guideline 3A1.4(b).

13 The sentencing range under the guidelines is  
14 therefore 30 years to life imprisonment. The government asks  
15 that a sentence within the guideline range be imposed. The  
16 defense asks that a lower sentence be imposed.

17 Based upon all of the factors that are set forth in  
18 18 U.S. Code Section 3553, including the guidelines, I  
19 conclude that a sentence within the guidelines range is  
20 appropriate.

21 The crimes committed here were extraordinarily  
22 serious. They had the potential if not thwarted to wreak  
23 havoc with New York City's public transportation system,  
24 indeed with the tristate area's transportation system as was  
25 established by the trial evidence.

1           This would have meant enormous economic loss both to  
2 public and private entities in the area and great disruption  
3 to the lives of those who use the public transportation  
4 system. Even more importantly, the potential for loss of life  
5 in the bombing of a major subway station sitting as it does  
6 under a large shopping area is obvious. Indeed, that was  
7 known to the defendant.

8           While the defendant stated that his goal was to  
9 damage the economy, he acknowledged knowing that even if the  
10 bombs were exploded at a relatively quiet time in the station,  
11 innocent people would likely be killed.

12           The defendant's role in the bombing plot was  
13 central. He initiated the plan and brought it to the  
14 cooperating codefendant and the confidential informant. He  
15 repeatedly scouted the station to determine where best to  
16 place bombs and how to avoid detection. He even planned how  
17 the conspirators should dress and what exits and entrances to  
18 use. His attempts now to minimize both the crimes and his  
19 role in them is not persuasive.

20           Under all of the circumstances, I now sentence the  
21 defendant within the guideline range to 30 years in prison.  
22 This sentence will be sufficient to serve as both punishment  
23 and deterrence to the defendant and to others.

24           Thus, technically the sentence will be as follows:  
25 On counts one, two and three concurrent terms of 20 years in

1 prison, which is the statutory maximum for each of those  
2 counts. And on count four a concurrent term of 30 years.

3 With respect to supervised release, the defendant is  
4 sentenced to three years concurrent terms of supervised  
5 release on counts one, two and three and a concurrent life  
6 term of supervised release on count four.

7 As a special condition of supervised release, if the  
8 defendant is deported, he is not to illegally reenter the  
9 United States.

10 No fine is imposed as the defendant appears unable  
11 to pay a fine. And finally, there is a mandatory 400-dollar  
12 special assessment.

13 The defendant is advised of his right to appeal.  
14 And I believe there are no open counts. The only issue would  
15 be if the defense wishes to make an application for a  
16 designation.

17 MR. STOLAR: Yes, I would ask that you recommend to  
18 the Bureau of Prisons that he be designated to an institution  
19 in the northeast region.

20 THE COURT: I will do that.

21 MR. MILLER: This is an underlying indictment. The  
22 defendant was convicted on a superceding indictment. So with  
23 respect to the underlying indictment, the government would  
24 move to dismiss any open counts.

25 THE COURT: The application is granted.

1 MR. STOLAR: I would also ask that you request that  
2 the Bureau of Prisons keep him in the New York area at least  
3 for the next two months so that he can consult with appellate  
4 counsel.

5 THE COURT: I'm not going to make that specific  
6 recommendation. I can certainly recommend a designation in  
7 general but I don't really know what the Bureau of Prisons  
8 policy is with respect to that.

9 MR. STOLAR: For appellate purposes they will often,  
10 if the Court directs, keep the person here beyond the four to  
11 6 weeks it takes to designate an institution.

12 THE COURT: Are you talking about being kept in the  
13 MDC rather than being designated?

14 MR. STOLAR: Yes.

15 THE COURT: You are asking that he be held at the  
16 MDC?

17 MR. STOLAR: For at least for a couple of months so  
18 that he can confer with appellate counsel.

19 THE COURT: Counsel, do you have any idea whether  
20 that is a reasonable thing?

21 MR. HARRISON: No, and I am reluctant to agree to  
22 anything. If the Mr. Stolar wants to make the motion, perhaps  
23 a schedule with a response from the Bureau of Prisons would be  
24 appropriate. In the absence of that, your Honor, we would  
25 oppose it.

1           THE COURT: Counsel, I'm just concerned. I don't  
2 know. Normally people want to leave the local facility and I  
3 don't really know what the issues are at the MDC for sentenced  
4 prisoners.

5           So I think Mr. Miller makes a good point. If there  
6 is any further application, probably you ought to make that  
7 with the Bureau of Prisons.

8           Anything else?

9           MR. STOLAR: Nothing else.

10          MR. MILLER: No, judge.

11          MR. HARRISON: No, judge.

12          (Matter concluded.)  
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